

SUPREME COURT OF WISCONSIN

In the Matter of the Amendment of
the Supreme Court Internal Operating
Procedures

ORDER
96-11

The court, on its own motion, has considered the advisability of amending its Internal Operating Procedures to reflect changes in the assignment of its professional personnel and the manner in which matters filed with the court are processed.

In addition, the court, pursuant to its June 1, 1995 order, No. 95-06, has reviewed the operation of its Internal Operating Procedure, III, providing for open court conferences on rule matters and has determined that those conferences should continue to be open and that no modification of the procedure for them is warranted at this time.

IT IS ORDERED that, effective the date of this order, the following amendments to the Supreme Court Internal Operating Procedures are adopted.

1. I. B. 1. of the Supreme Court Internal Operating Procedures is repealed.
2. I. B. 2 of the Internal Operating Procedures is renumbered I. B. 1.
3. I. B. 3 of the Supreme Court Internal Operating Procedures is renumbered I. B. 2. 4. II. B. 1. of the Supreme Court Internal Operating Procedures is amended to read:

B. Staff Analysis and Reporting

1. *Petition for Review.* Upon filing in the office of the clerk, petitions for review are assigned by clerk staff to the court's commissioners on a rotation basis for analysis prior to the court's consideration of the matters presented. Within 60 days of assignment of the petition, the commissioner to whom a petition for review is assigned prepares and circulates to the court a memorandum containing a thorough legal and factual analysis of the petition, including the applicability of the criteria for the granting of a petition for review set forth in sec. 809.62(1), Stats., a recommendation for the

granting or denial of the petition and, where appropriate, a recommendation for submission of the matter to the court for decision on briefs without oral argument.

Once each month and at other times as the court may direct, a commissioners' conference is held at which each commissioner orally reports to the court on the petitions for review as to which memoranda have been circulated. At least ~~three working days~~ one week prior to the commissioners' conference, each commissioner circulates to the court ~~memoranda~~ the petitions for review, the responses to those petitions and the opinions of the Court of Appeals sought to be reviewed and a memorandum on each petition, together with an agenda sheet listing by caption and docket number the cases to be reported on at the conference and the commissioner's recommendation in each case. Prior to the commissioners' conference, Each each member of the court reads the ~~petitions for review, the responses to those petitions, the opinions of the Court of Appeals sought to be reviewed, and the commissioners' memoranda~~ materials circulated in cases on the agenda sheet ~~prior to the commissioners' conference.~~

At the commissioners' conference, the chief justice or the reporting commissioner states the ~~issues in~~ name of each case, and the members of the court are asked whether they have any objection to the commissioner's recommendation. If there is no objection, the commissioner's recommendation is accepted without further discussion.

If any justice objects to the commissioner's recommendation or requests discussion of the case, the commissioner or a justice reports on the case and the court discusses it. Following discussion, the court decides whether to grant or deny the petition for review and, if the petition is granted, whether the case will be scheduled for oral argument or for submission on briefs, and whether the court will limit the issues in the case.

A petition for review is granted upon the affirmative vote of three or more members of the court. The purpose of requiring less than a majority of the court to grant a petition for review is to accommodate the general public policy that appellate review is desirable. After a petition for review is

granted and briefing is completed, if a justice who originally voted in favor of granting the petition makes a motion to have the petition dismissed as improvidently granted, the petition will be dismissed upon the affirmative vote of four or more members.

The commissioner to whom the petition has been assigned prepares an order setting forth the court's decision on the petition for review and arranges for the issuance of the order by the office of the clerk. If the petition is granted, the order specifies the court's limitation of issues, if any, and the briefing schedule. The order provides that in their briefs the parties shall not incorporate by reference any portion of their Court of Appeals briefs or their briefs submitted with or in response to the petition for review.

Although briefs previously filed in the Court of Appeals are available and may be relied upon by the parties on review, because the appellate function of the Supreme Court differs essentially from that of the Court of Appeals, it is desirable that parties file additional briefs on review of the Court of Appeals decision.

5. II. B. 2. of the Supreme Court Internal Operating Procedures is amended to read:

2. *Petition to Bypass, Certification and Direct Review.* A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

The Court of Appeals may request the Supreme Court to exercise its appellate jurisdiction by certifying a pending appeal to the Supreme Court prior to hearing and deciding the matter. Certifications are granted on the basis of the same criteria as petitions to bypass.

Petitions to bypass and certifications are processed according to the procedure set forth above for petitions for review, except that these matters are given priority over petitions for review, and the ~~commissioner's~~ commissioners' memoranda are circulated to the court as soon as practicable, but not later than 30 days after the petition to bypass or the certification is assigned for analysis. Petitions to bypass and certifications are granted upon the affirmative vote of four or more members of the court.

Before the court on its own motion decides to ~~grant direct~~ review directly a matter appealed to the Court of Appeals, the chief justice may assign the matter to a commissioner for analysis. If the matter is so assigned, it is processed according to the procedures set forth in this section for petitions to bypass and certifications.

6. II. B. 3. of the Supreme Court Internal Operating Procedures is amended to read:

3. *Original Action.* Upon filing in the office of the clerk, a petition requesting the court to take jurisdiction of an original action is assigned on a rotation basis to ~~the assistant to the chief justice a~~ court commissioner for analysis prior to the court's consideration of the merits of the matter presented. The ~~assistant~~ commissioner orally reports on the matter to the chief justice as soon as practicable, and the chief justice, or in the absence of the chief justice, the most senior justice present, determines a date on which the matter will be considered by the court at conference. The ~~assistant~~ commissioner reports on the matter at that conference. If time permits, the ~~assistant~~ commissioner circulates a memorandum to the court prior to that conference analyzing the legal and factual issues involved and making a recommendation for the denial of the petition ex parte or for a response to be ordered and for the scheduling of oral argument on the question of the court's exercise of its original jurisdiction, if oral argument is deemed necessary. If circumstances warrant, the chief justice, or in the absence of the chief justice, the most senior justice present, may order a response to the petition for original action and may act on nonsubstantive motions concerning the proceeding.

If the petition is denied, the ~~assistant~~ commissioner prepares an order setting forth that decision

and arranges for its issuance through the office of the clerk; if a response is ordered, the ~~assistant~~ commissioner prepares an order setting forth that decision, as well as the decision on oral argument. When the order is approved by the chief justice, or in the absence of the chief justice, the most senior justice present, the ~~assistant~~ commissioner arranges for its issuance by the office of the clerk. Upon the filing of a response, the matter is ~~assigned by clerk staff to a court commissioner~~ referred to the commissioner for analysis and reporting. The original action is then processed according to the procedures set forth above for petitions for review.

A petition to commence an original action is granted upon the vote of four or more members of the court. The criteria for the granting of a petition to commence an original action are a matter of case law. *See, e.g., Petition of Heil*, 230 Wis. 428 (1939). The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact. Upon granting a petition to commence an original action, the court may require the parties to file pleadings and stipulations of fact. The court customarily holds oral argument on the merits of the action and expedites the matter to decide it promptly.

7. II. B. 4. of the Supreme Court Internal Operating Procedures is amended to read:

4. *Petition for Supervisory Writ; Petition for Writ of Mandamus, Prohibition, Quo Warranto, Habeas Corpus*. The Supreme Court has supervisory authority over all actions and proceedings in the trial courts and the Court of Appeals. It does not ordinarily issue supervisory writs concerning matters pending in trial courts, as the Court of Appeals also has supervisory authority over all actions and proceedings in those courts. A person may request the Supreme Court to exercise its supervisory jurisdiction by filing a petition pursuant to sec. (Rule) 809.71, Stats.

Petitions for supervisory writ and petitions for writ of mandamus, prohibition, quo warranto, or habeas corpus are processed according to the procedure set forth above for petitions for

commencement of an original action, except that if time does not permit consideration by the court, petitions for supervisory writ may be denied ex parte ~~or a response may be ordered~~ by the chief justice, or, in the absence of the chief justice, by the most senior justice present. If it appears from the petition that it should be dismissed on procedural grounds, the chief justice, acting for the court, may deny the petition ex parte.

8. II. B. 5. of the Supreme Court Internal Operating Procedures is amended to read:

5. *Regulatory Jurisdiction.* ~~All~~ A matters within the regulatory jurisdiction of the court, *e.g.*, bar admission, continuing legal education, lawyer discipline, judicial discipline, Supreme Court Rules, rules of pleading, practice and procedure in civil and criminal actions, ~~are~~ is assigned to ~~the assistant to the chief justice~~ a court commissioner for analysis and reporting to the court. The ~~assistant commissioner~~ prepares orders in these matters as the court may direct and, when the orders are approved by the chief justice, arranges for their issuance by the office of the clerk.

9. II. B. 6 of the Supreme Court Internal Operating Procedures is amended to read:

6. *Motions.* When acting on motions, the chief justice, or in the absence of the chief justice, the most senior justice present, acts on ~~motions, he does so on~~ behalf of the court and pursuant to rules of the Supreme Court promulgated from time to time.

a. Unopposed procedural motions are acted on by the clerk. Procedural motions which do not adversely affect another party, *e.g.*, motions to extend time to file briefs or to exceed page limitations of briefs, are acted on by the clerk without a response from the adverse party, unless the clerk requests a response. The clerk decides these motions in consultation with ~~the assistant to the chief justice or the~~ commissioner to whom the matter has been assigned for analysis. The clerk prepares and issues an appropriate order.

Where appropriate, ~~the assistant or the~~ commissioner presents a motion to the chief justice, or in the absence of the chief justice, the most senior justice present, with a recommendation for the granting or denial of the motion, and the chief justice or the most senior justice present decides the motion. The ~~assistant or the~~ commissioner prepares an appropriate order and, when the order is approved by the chief justice or the most senior justice present, arranges for its issuance by the office of the clerk.

b. Substantive motions are assigned by clerk staff to the court's commissioners on a rotation

basis for review and reporting to the court, with or without a memorandum, as time may permit and circumstances may indicate. If the motion is filed in a case that has been assigned to a justice, clerk staff transmits the motion to that justice for review and reporting to the court. When the motion has been decided, the commissioner or clerk staff, at the justice's direction, prepares an appropriate order and, when the order is approved by the chief justice, arranges for its issuance by the office of the clerk.

c. A motion to file a brief by a person not a party to a proceeding is assigned to the ~~assistant to the chief justice~~ court commissioner to whom the matter has been assigned for analysis, who may grant the motion if it appears that the movant has a special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court. If the ~~assistant to the chief justice~~ commissioner questions the propriety of granting the motion or if it appears that the motion should be denied, the ~~assistant~~ commissioner orally reports the matter to the chief justice, who may grant the motion or report it to the court with a recommendation that it be denied. The decision to deny a motion to file an *amicus* brief is that of the court. The ~~assistant~~ commissioner prepares an appropriate order and arranges for its issuance by the office of the clerk.

If the motion is filed in a case that has been assigned to a justice, clerk staff transmits the motion to that justice for review and decision. Clerk staff, at the justice's direction, prepares and issues an appropriate order.

d. Motions for temporary relief concerning matters pending in the Supreme Court are assigned to the justice or commissioner to whom the underlying matter has been assigned and with whom it remains at the time of the filing of the motion. That justice or commissioner reports the matter to the court or to the chief justice, or in the absence of the chief justice, to the most senior justice present, with or without a memorandum, as time and circumstances may indicate. The court or the chief justice or the most senior justice present decides the motion, and the commissioner or the reporting justice prepares an appropriate order and arranges for its issuance by the office of the clerk.

10. II. E. of the Supreme Court Internal Operating Procedures is amended to read:

E. Postargument Decision Conference

Following each day's oral arguments, the court meets in conference to discuss the cases argued that day. The chief justice presides at the conference, conducts the court's discussion, and calls for the vote on the decision of each case.

For each case, the justice to whom the case was assigned for presentation at the pre-argument conference gives his or her analysis and recommendation, the court discusses the issues in the case, and the votes of ~~the~~ each members of the court on the decision ~~are~~ is taken, usually in descending order of seniority, beginning with the justice who has given the recommendation. When possible, the court reaches a decision in each of the cases argued that day, but any decision is tentative until the decision is mandated. Prior to a tentative decision, any justice may have a case held for further consideration and discussion. Following the court's tentative decision, any justice may request reconferencing for further discussion of the case. In

the week following the oral arguments, a conference is held at which the court decides the cases on the month's submission calendar which are not decided at post-argument conference.

11. II. H. of the Supreme Court Internal Operating Procedures is amended to read:

H. Per Curiam Opinion

Per curiam opinions may be prepared by court commissioners ~~or the assistant to the chief justice~~ for consideration by the court. Per curiam opinions in judicial and attorney disciplinary proceedings are prepared by ~~the assistant to the chief justice~~ a court commissioner for the court's consideration. In some cases per curiam opinions are prepared by a justice. The decisions in all cases are made by the court, and the per curiam opinions are reviewed by the entire court and are approved as to form and substance by the court prior to issuance.

12. II. L. 2. of the Supreme Court Internal Operating Procedures is amended to read:

2. *Indigency.* If a person seeking to proceed in the Supreme Court claims to be indigent, that claim will be accepted if an indigency determination as to that person previously has been ~~previously~~ made in the Supreme Court or in the Court of Appeals. If no indigency determination has been ~~previously~~ made previously, the clerk sends the person an affidavit of indigency to be completed and returned. The affidavit is accompanied by a form order requiring completion and filing of the affidavit within 10 days of the date of the order or, failing which, ordering the dismissal of the proceedings.

The clerk makes indigency determinations based upon monetary guidelines established by the court. If the person is determined to be indigent, the clerk issues an order waiving payment of the filing fee in the proceeding. If the affidavit of indigency is incomplete or is not credible, the clerk issues an order stating that the affidavit is incomplete or the reasons for which the affidavit is deemed not credible, stating that the affidavit is not approved, and requiring the person either to pay the appropriate filing fee or submit a credible and completed affidavit within five days of the date of the order, failing which the proceedings will be dismissed.

If the clerk determines on the basis of a complete and credible affidavit that a person is not indigent, the clerk issues an order directing the person to pay the appropriate filing fee in the proceedings. If the person does not respond to a court order concerning indigency, the clerk assigns the matter to a commissioner for review and reporting to the court, with recommendations for the disposition thereof.

13. II. L. 3. of the Supreme Court Internal Operating Procedures is amended to read:

3. *Statistics.* The clerk prepares a monthly statistical report setting forth the status of matters pending with the court and a cumulative accounting of matters disposed by the court from the preceding September. The clerk distributes a copy of these statistical reports to the court; and to the director of state courts ~~and to the assistant to the chief justice.~~

14. III. A. 1. of the Supreme Court Internal Operating Procedures is amended to read:

1. *Public Hearing.* The court notices and holds a public hearing on a petition for the creation or amendment of rules governing pleading, practice and procedure in judicial proceedings in all courts. See, sec. 751.12, Stats. The court also holds a public hearing on a petition for amendment of the Supreme Court Rules except, in the court's discretion, when the petition concerns ministerial or otherwise non-substantive matters or when exigent circumstances exist.

15. III. A. 2. e. of the Supreme Court Internal Operating Procedures is amended to read:

e. Staff. All matters within the court's rule-making jurisdiction are assigned to ~~the assistant to the chief justice~~ a court commissioner for analysis and reporting to the court. See IOP, II, B, 5. ~~The assistant to the chief justice~~ commissioner prepares and circulates material to the court for its assistance at the conference, participates in the conference at the court's discretion, and drafts rules and prepares orders at the court's direction.

IT IS FURTHER ORDERED that notice of these amendments of the Supreme Court Internal Operating Procedures be given by a single publication of a copy of this order in the official state

newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 16th day of September, 1996.

BY THE COURT:

Marilyn L. Graves, Clerk